FLASTER GREENBERG
ATTORNEYS AT LAW • A PROFESSIONAL CORPORATION

COMMERCE CENTER
1810 CHAPEL AVENUE WEST
CHERRY HILL, NJ 08002
(856) 661-1900
FAX: (856) 661-1919
WWW.FLASTERGREENBERG.COM

J. PHILIP KIRCHNER, ESQUIRE
Member of NJ & PA Bar
Direct Dial (856) 661-2268
E-Mail:phil.kirchner@flastergreenberg.com
PLEASE RESPOND TO CHERRY HILL

October 22, 2004

Via Overnight Mail
Federal Communications Commission
Office of the Secretary
9300 East Hampton Drive
Capitol Heights, MD 20743

Re: IN THE MATTER OF REQUEST FOR REVIEW BY RELCOMM, INC. OF DECISION OF UNIVERSAL SERVICE ADMINISTRATOR
CC Docket No. 02-6SLD decision 1022916 and 1023492
Year Six E-Rate
Billed entity #123420: Atlantic City Board of Education

1. PETITIONER RELCOMM, INC.'S OPPOSITION TO PETITION OF THE ATLANTIC CITY BOARD OF EDUCATION ("ACBOE") FOR WAIVER OF 47 C.F.R. §§ 54.721(d) AND 54.725.

2. PETITIONER RELCOMM, INC.'S REPLY TO OPPOSITION OF ATLANTIC CITY BOARD OF EDUCATION AND ALEMAR CONSULTING

Dear Sir or Madam:

Please accept this letter as the Petitioner RelComm, Inc.'s ("RelComm"):

- Opposition to Petition of the Atlantic City Board of Education for waiver of 47 C.F.R. §§ 54.721 (d) and 54.725
- Reply pursuant to 47 C.F.R. § 1.45(c) in further support of RelComm's Request for Review.

I. BACKGROUND

On August 8, 2004, RelComm filed a Request for Review along with a statement of relevant facts pursuant to 47 C.F.R. § 54.721(b). In particular, RelComm requested that the FCC review:

> Whether ACBOE's [and related parties'] acts, omissions and violations of specific SLD regulations and FCC orders in connection with the procurement of funding for Year Six warrant (1) a reversal of the SLD's decision to fund ACBOE's Year Six application, and/or (2) suspension or disbarment of these entities from participation in the E-Rate program.

RelComm's Request for Review is based upon the identical facts alleged in a lawsuit RelComm filed against ACBOE on February 23, 2003 (the "Lawsuit"), nearly a year and a half prior to the Request for Review. A copy of the complaint is attached as Exhibit A to RelComm's August 8, 2004 submission along with the affidavit of Michael Shea, the president of RelComm. [1]

Although most of the documentary evidence that supports RelComm's claims in the Lawsuit and in its Request for Review is in the possession of ACBOE, RelComm also produced all relevant documentation in its possession to ACBOE in discovery in the Lawsuit in November 2003. Thus, ACBOE knew the factual and legal basis of RelComm's claims over 18 months before the filing of the Request for Review and had all relevant documentation in connection with that claim in its possession over 10 months ago. Nevertheless, ACBOE did not respond to RelComm's Request until October 14, 2004, nearly 2 months after it was due.[2]

II. RELCOMM'S RESPONSE TO ACBOE'S PETITION FOR WAIVER OF 47 C.F.R. § 54.721(d) and 54.725

A. ACBOE's petition for waiver of 47 C.F.R. § 54.721(d) should be denied because ACBOE has not shown good cause for failing to meet the filing deadline.

As ACBOE freely admits, its pleading in opposition to RelComm's Request for Review was filed on October 14, 2004, well beyond the deadline, no matter which section of the applicable regulation

[1] Although the February 23, 2003 complaint was filed in federal court, it was subsequently removed to state court and, therefore, a copy of the most recent complaint is attached. However, it should be noted, RelComm's claims in both complaints are essentially the same.

[2] Alemar Consulting, ACBOE's technology consultant, which was responsible for conducting ACBOE's Year 6 bid at issue in this Request for Review, appears to have joined in ACBOE's opposition.

applies. ACBOE admittedly filed its so-called "Response" to RelComm's Request for Review well outside all of the deadlines designated in 47 C.F.R. § 145, as incorporated in 47 C.F.R. § 54.721(d). In essence, the only excuse ACBOE has put forth is that "the time frame was insufficient." See ACBOE's Petition for Waiver at page 2. Although ACBOE alleges that an extension of time was needed, it never filed a request for extension of time, as provided for under 47 C.F.R. § 1.46. Id. Indeed, ACBOE blatantly ignored the deadlines for responding to RelComm's Request for Review, and now asks for waiver of those deadlines without showing the requisite good cause.

ACBOE refers to its pleading as a "Response" and contends that it had fifteen (15) days from the filing of RelComm's Request for Review to file that Response. However, neither ACBOE's description of its pleading nor its calculation of the time deadline is accurate. ACBOE relies on 47 C.F.R. § 54.721(d), but fails to note that a Response under subpart d only applies where the Request for Review alleges "prohibitive conduct on the part of the *third-party*." (emphasis supplied). However, ACBOE is not a "third-party" in this case. Rather, ACBOE's actions *are* the subject of RelComm's Request for Review. Accordingly, ACBOE's Response is actually an "Opposition" to the Request for Review, which must have been filed within ten (10) days of RelComm's Request, pursuant to 47 C.F.R. § 145(b) as incorporated by 47 C.F.R. § 54.721(a). Regardless, however, whether ACBOE's pleading is a Response or an Opposition, it was filed well after any arguably applicable deadline with no genuine excuse. A Response would have been due August 23, over 7 weeks ago, and an Opposition was due on August 18, 2004, over 8 weeks ago. The question, therefore—whether it was filed seven or eight weeks late—is academic.

Having failed to file its Opposition before any arguably applicable deadline, and having failed to request an extension, ACBOE now belatedly petitions the FCC to waive the filing deadline. RelComm opposes this waiver because it is not warranted.

Pursuant to 47 C.F.R. § 1.3, the FCC may waive a rule on its own motion or on petition only if good cause is shown. However, waiver under 47 C.F.R. § 1.3 is not warranted under these circumstances because ACBOE has not shown good cause. Rather, it attempts to glibly rely on its mistaken allegation that RelComm made misstatements in its Request for Review and that ACBOE was too busy participating in pretrial discovery in the Lawsuit to take the time to file within the FCC's deadlines. Neither excuse is at all persuasive. Even if ACBOE's allegations were true, the exception it requests would completely swallow the rule. Every Opposition, by its very nature, asserts some disagreement with the facts alleged in the Request; otherwise, there would be no reason for filing it. In fact, if the existence of misstatements were adequate grounds for filing an untimely response, any respondent would be free to flagrantly disregard the FCC's filing deadlines, as ACBOE attempts to do. This feeble excuse by ACBOE does not even come close to showing the good cause required for a waiver.

Further, ACBOE's excuse that matters were complicated because RelComm's Request was filed in the midst of pretrial discovery in the Lawsuit, is both inadequate and inaccurate. First, it is inadequate to rely on the fact that litigation is ongoing as an excuse for delay. Second, it is inaccurate to say that the pending litigation complicated matters. If anything, the fact that ACBOE was intimately familiar with RelComm's contentions and had been privy to RelComm's document production for nearly a year should have facilitated, not delayed, its ability to file a timely response. Moreover, even without the benefit of RelComm's document production, the substance of RelComm's claims relate directly to ACBOE's actions and policies, matters with which ACBOE is significantly more familiar than RelComm.

Despite the FCC's power to waive certain rules under 47 C.F.R. § 1.3, the FCC may not do so arbitrarily. See North East Cellular Tel. Co. v. FCC, 897 F.2d 1164, 1167 (D.C. Cir. 1990). Generally, the FCC and courts have recognized that the FCC can waive its rules only when "particular facts would make strict compliance inconsistent with the public interest." New York v. FCC, 267 F.3d 91, 108 (2d Cir. 2001); See also In Re Applications of Hispanic Information and Telecommunications Network, Inc,

18 F.C.C.R. 11465 (2003). In keeping with this standard, the FCC has denied requests for waiver of time deadlines where the applicant blamed its late filing on poor clerical management. See In Re Request for Review of the Decision of the Universal Service Administrator by St. Joseph University Heights, 18 F.C.C.R. 1789 (2003) (FCC denied waiver of 30-day deadline for Request for Review of decision pursuant to 47 C.F.R. § 54.720(b)). Likewise, the FCC has denied waiver where the submission was not timely because a key employee was out of the office due to emergency medical leave. See In Re Request for Review of the Decision of the Universal Service Administrator by St. Lucy School, 18 F.C.C.R. 1792 (2003) (No good cause shown when school states that the technology coordinator was unavailable, due to emergency medical leave). The above excuses, which were rejected, are, if anything more worthy of consideration for a waiver than those put forward by ACBOE.

Like the above-cited instances, the facts here simply do not support its request for waiver. In fact, given that ACBOE was already intimately familiar with RelComm's legal theory, statement of facts, and supporting documentation, it should have been easier for it to file its Opposition on a timely basis. ACBOE's excuse might be somewhat credible had it missed the filing deadline by a day or two, but this is no de minimus infraction. Rather, it took ACBOE five times longer to respond than is allowed under the applicable regulation.

As ACBOE has failed to show good cause for waiver of the filing deadline, it is respectfully requested that waiver be denied and that ACBOE's Opposition be disregarded.

B. ACBOE's Petition for Waiver of 47 C.F.R. § 54.725 should be denied because it has not shown good cause for lifting the stay on the Administrator's payment.

Pursuant to 47 C.F.R. § 54.725, as a result of RelComm's Request for Review, "the Administrator shall not reimburse a service provider for the provision of discounted services until a final decision has been issued either by the Administrator or by the Federal Communications Commission." ACBOE has now petitioned for waiver of this stay. However, ACBOE has not shown good cause for waiving the stay

and, therefore, waiver is not warranted. In fact, the important policies underlying 47 C.F.R. § 54.725 are especially applicable in this case and require the rejection of ACBOE's request for a waiver.

ACBOE's argument for waiver does not take into account the fundamental policy considerations underlying 47 C.F.R. § 54.725. In particular, the stay provisions of 47 C.F.R. § 54.725 serve to deter fraud and to ensure that the limited pool of FCC resources is allocated to vendors and school systems that have earned the applicable discounts. Essentially, 47 C.F.R. § 54.725 protects the FCC and the entire E-Rate program by making sure that payments are made only on behalf of school districts that have complied with program requirements and only to service providers that are entitled to payment. In spite of this, ACBOE requests this protection be waived simply because the delay is interfering with its ability to "undertake its new procurements." See ACBOE Petition for Waiver at page 3. ACBOE, however, has not shown that the delay required by 47 C.F.R. § 54.725 would do anything other than delay its purchase of unnecessary equipment intended to replace the perfectly good equipment currently installed there. In short, the "procurements" it seeks to accelerate are insufficient reason to waive the stay.

In support of its Petition for Waiver, ACBOE misrepresents that RelComm's challenge to ACBOE's action has already been fully considered by the New Jersey State Department of Education ("DOE") and the Schools and Libraries Division ("SLD"). Contrary to ACBOE's contentions, the DOE's review was a limited inquiry into whether or not ACBOE opened its bid to multiple bidders. It did not examine the manner in which ACBOE conducted the bidding procedures beyond ensuring that several bidders participated.[3] A copy of the New Jersey Department of Education Report of Examination is attached hereto as Exhibit A. Likewise, ACBOE misrepresents the SLD's Item 22 Selective Review. The SLD's review was limited in scope and only addressed ACBOE and Micro Technology Groupe, Inc.

[3] The DOE actually sanctioned ACBOE for awarding no bid contracts to Alemar and ComTec Communications, ACBOE's telecommunications consultant. ComTec is the same company that is currently working for ACBOE installing cable under a contract awarded for Year 6 after it had earlier assisted ACBOE in developing specifications for the Year 6 telecommunications bids and also assisted it in evaluating those bids and choosing the successful vendor to be awarded contracts. See infra at 13.

("MTG"), the vendor selected by ACBOE to receive its internal connections award for Year Six of the E-Rate program. In fact, RelComm was never consulted with regard to the SLD's review.

RelComm has now learned that Alemar, the company hired by ACBOE to respond to the SLD Selective Review, withheld crucial information from the SLD in its response. See discussion infra at 11-14.

Furthermore, the fact that the SLD and the DOE conducted a limited investigation into ACBOE's activities is not relevant, nor is it a reason for waiver of 47 C.F.R. § 54.725. In particular, an aggrieved party has the right to file a Request for Review with either the SLD or the FCC. RelComm has chosen to seek recourse directly before the FCC. In this respect, the FCC's review is de novo and is independent of the limited review conducted by the SLD and the DOE. This is especially true given that RelComm was not even consulted as part of the SLD's review and, therefore, RelComm's concerns were, by definition, not addressed.

In addition, ACBOE's attempt to rely on the decision of the SLD to add credibility to its petition for waiver is inconsistent with the Request for Review procedure. An aggrieved party, like RelComm, has the option of seeking redress before the SLD or before the FCC by filing a Request for Review. 47 C.F.R. § 54.725; USAC Website (http://www.sl.universalservice.org/ reference/appealsprocedure.asp) (Appeals Procedure). In using the SLD's review to add credibility to its petition for waiver, the ACBOE seeks to deny RelComm its right to have its Request for Review considered de novo by the FCC.

Finally, ACBOE's offer to serve as guarantor should be rejected. RelComm's Request for Review involves FRNs 1022916 and 1023492, and ACBOE has offered to guarantee repayment of these discounts if RelComm's Request is granted and the award to ACBOE is reversed. As ACBOE acknowledges, these FRNs represent nearly $3.5 million in payments. If ACBOE truly has the ability to pay for these services itself, there is nothing stopping it from doing so and then seeking reimbursement from USAC if RelComm's Request is denied.

ACBOE's offer to guarantee repayment, however, must be rejected, and, accordingly, its request for a waiver of the requirements of 47 C.F.R. § 54.725 must be denied. ACBOE is still trying to recover from a well-publicized $3 million budget deficit, which was revealed last year. Copies of articles detailing ACBOE's budget plight are attached hereto as Exhibit B. Importantly, ACBOE requested that the Atlantic County prosecutor investigate the circumstances of that deficit to determine whether any criminal conduct was involved, and that investigation is still ongoing. The School Board has not passed a resolution authorizing the offer of guaranty, and, given its current financial condition, it would be a violation of law for it to do so. See N.J.A.C. § 6A:23-2.11. The resolution actually passed by the Board authorizes ACBOE only to incur an obligation for the non-discounted portions of its Year 6 Award and then only if its Year 6 application successfully is funded. ACBOE's offer to guarantee repayment, therefore, is illusory.

Given ACBOE's questionable financial condition, it is inappropriate to waive the protections of 47 C.F.R. § 54.725. Those protections are designed to safeguard the public funds administered by the FCC from the very types of fraud alleged in RelComm's Request for Review. Neither the taxpayers of this country nor of Atlantic City should be exposed to the risks entailed in granting the waiver requested by ACBOE.

For the forgoing reasons, ACBOE has not shown good cause for waiver of 47 C.F.R. § 54.725, and therefore its petition should be denied.

III. RELCOMM'S REPLY TO OPPOSITION OF ACBOE AND ALEMAR CONSULTING. RELCOMM'S PETITION FOR REVIEW SHOULD BE GRANTED.

Because ACBOE's Opposition was filed almost 2 months late, with no reasonable or plausible excuse, it must be rejected. If, however, the FCC chooses to allow the late filing of the Opposition,

RelComm hereby replies to it pursuant to 47 C.F.R. §145(c). ACBOE's Opposition should be rejected in its entirety on its merits, and RelComm's Request for Review should be granted for the following reasons.

ACBOE's and Alemar's accusation that RelComm is nothing more than a disgruntled bidder (see Opposition at 2), even if true, cannot mask the facts that demonstrate that ACBOE's Year 6 bidding process and contract awards are rife with fraud. Their strategy for defending against the charges raised by RelComm appears to be to attack the messenger. Not only are their accusations against RelComm unsupportable, but also even if they were true, they do not in any way change or negate the nature of the fraud committed by ACBOE and Alemar, which is the subject of the Request for Review. Their arguments in their Opposition must be rejected because, for the most part, they amount to nothing more than misguided and inaccurate ad hominum attacks on RelComm.

Most of the so-called "problems" cited by ACBOE and Alemar with the existing ACBOE network, which they inaccurately imply were caused by RelComm, actually have absolutely nothing to do with any work performed by RelComm. For example, the cabling, which is the subject of numerous complaints referenced in the Opposition, was installed by Lucent in Year 1 of the E-rate program before RelComm ever did any work for ACBOE. RelComm's first E-rate work for ACBOE was maintenance of the network in Year 2. The pictures included with the Opposition are photographs of cabling installed in closets by Lucent in Year 1, and RelComm played no role whatsoever in that work. Not that it is relevant to the issues raised in RelComm's Request for Review, but Lucent's placement of that equipment was dictated by the nature of the ACBOE facilities, many of which are older, outdated buildings with plaster walls and ceilings that are not conducive to modern network cabling schemes. Moreover, that wiring is still under warranty, and has many years of use left. Finally, although it is true that the existing wiring in ACBOE's older facilities should be secured, it is not true, as ACBOE and Alemar have argued, that it needs to be replaced. In fact, of the - vendors who bid on wiring work for ACBOE in Year 6, only MTG's bid called for replacement of the existing wiring -- at significant unnecessary expense.

In addition, the environmental problems for which ACBOE and Alemar have blamed RelComm - including inadequate ventilation, poor placement of servers and exposure of equipment to light and heat sources -- are ACBOE's responsibility, not RelComm's. Indeed, RelComm advised ACBOE that the district's environmental conditions, which are not E-ratable and which are ACBOE's responsibility, must be improved or ACBOE risked ruining the valuable equipment purchased for it with E-rate dollars. In addition, even MTG in its Year 6 bid proposal cited those same environmental problems and stated that the district MUST correct those problems immediately or risk permanent damage to its equipment. Instead of correcting its environmental problems, however, ACBOE and Alemar chose in Year 6 to award MTG a contract to rewire the entire district at a cost of $700,000, despite that the existing wiring had many useful years of life left and was subject to a warranty that had several years left. Notably, MTG was the only bidder that included a quote to rewire the school district in response to ACBOE's Year 6 Request for Proposal. Apparently, instead of fixing the real problem for which it was responsible, ACBOE would prefer to waste taxpayers' money awarding unnecessary contracts to install new equipment that will be subject to the same substandard and detrimental environmental conditions as the old equipment.

ACBOE also places great reliance on its argument that neither the DOE nor the SLD made a finding of fraud in connection with ACBOE's Year 6 bid. ACBOE's reliance, however, is totally misplaced. Neither of those entities conducted a fraud investigation and neither investigated RelComm's evidence in support of its allegations of fraud in connection with ACBOE's Year 6 bid procedures and awards.

Despite its offer to do so, RelComm was not contacted by the DOE to share the evidence of fraud it has uncovered in discovery in the Lawsuit. Rather, as is evident from a review of the DOE's findings in its Report of Examination (see Exhibit A), DOE was only interested in learning whether multiple competitive bids had been received in Year 6. Because it learned that eight vendors had bid, it concluded, incorrectly, that "the bidding was conducted appropriately."

Nor did the SLD contact RelComm in connection with its Selective Review of ACBOE's Year 6 application for funding. It is true that the SLD made numerous inquiries to ACBOE -- through its hired consultant, Alemar -- about its Year 6 bid procedure and awards. However, RelComm has now learned through discovery in the lawsuit that Alemar, which was retained by ACBOE to respond to the SLD's inquiry, withheld evidence from the SLD that might have changed the SLD's funding decision had it had access to that evidence. RelComm will discuss that evidence below.

First, Alemar and ACBOE did not disclose to the SLD that Alemar's principal, Martin Friedman, communicated with MTG about the contents of MTG's bid after the sealed bids had been submitted but before they had been opened and evaluated. At his recent deposition, Mr. Friedman was shown a copy of an e-mail exchange he had with Rich Linkhorst, an employee of MTG, on February 2, 2003, two days after the deadline for submitting sealed bids in response to ACBOE's solicitation of bids. In the communication, Friedman asked MTG whether its bid proposal included a Video PBX solution, and MTG responded that it did. See Exhibit C for a copy of the e-mail exchange and the relevant portion of Friedman's testimony. Friedman was unable to explain his e-mail exchange with MTG. Leslie Motz, ACBOE's Business Administrator and Board Secretary, testified at her deposition that Friedman not only created the bid specifications for Year 6, but also was responsible for evaluating the bids and providing recommendations to the Board for Year 6 contract awards. See Exhibit D. Marilyn Cohen, the ACBOE Director of Technology, corroborated Ms. Motz's testimony at her deposition when she testified that she had nothing to do with evaluating the bids or recommending award recipients to the Board in Year 6. See Exhibit E. Thus, the person responsible for evaluating the bids and recommending to the Board the entities that should receive awards -- Friedman -- had a private conversation with one of the bidders, after the sealed bids had been submitted but before they had been opened, about the contents of the sealed bid. That bidder -- MTG -- was the recipient of the $3.6 Year 6 ACBOE contract award, which is the subject

of this Request for Review. It is reasonable to assume that the SLD might have found this exchange to be of interest in connection with its Selective Review.

What makes the communication between Alemar and MTG even more egregious is the subject of the communication: whether MTG's bid included a proposal for a Video PBX. Attached hereto as Exhibit F is a copy of the bid package delivered to all prospective bidders prior to bidding on ACBOE's Year 6 solicitation (i.e., the specifications for ACBOE's Year 6 bid). Nowhere in those specifications is there any mention of a request for bids on a Video PBX. In fact, MTG was the only bidder that included a Video PBX solution in its proposal, and, of course, it received an award in the amount of approximately $830,000 to provide that solution to ACBOE.[4]

The illicit communication between Alemar and MTG is no surprise, nor is this the first time that those two entities have collaborated to secure E-rate contracts. Attached hereto as Exhibits G, H, I, J and K are printouts showing contract awards at schools for which Alemar served as the E-rate consultant during Years 3, 4 5, 6 and 7, respectively. In every instance in which Alemar has managed a bid for a school or school district, 36 times in all, MTG has received a contract award every time, with only one exception, which will be described below.[5] Alemar has managed 36 bids for numerous schools and school districts, and, incredibly, MTG has received a contract from those schools 35 of the 36 times.

RelComm has not yet discovered whether there are any direct financial connections between Alemar and MTG. However, it has discovered the connection described above which is obviously much more than a mere coincidence. MTG and Alemar are clearly joined at the hip. MTG introduces Alemar to school districts and then MTG gets awarded a contract after Alemar has been hired to manage the bid.

[4] MTG was also the only bidder to include installations at the ACBOE high school building, and it received an award for that work in Year 6. The 470 form filed by Alemar did not mention or include the high school building, and, when questioned by prospective bidders at the mandatory facilities tour prior to submission of bids, Alemar's representatives insisted that the high school building was not included in the bid.

[5] MTG also uses the trade name Complete Convergence.

The interrelationships among the players in this case are even more entwined. ComTec, which received an unlawful no-bid contract from ACBOE to provide consulting services for ACBOE in connection with the Year 6 bid, including "review and recommendation of bids for the internal connections portion of e-rate funding..." (Exhibit A) first introduced Alemar to ACBOE. See Friedman testimony, attached hereto as Exhibit L. Alemar, in turn, made sure that ComTec was awarded contracts from several schools at which Alemar was managing the bids. See, e.g., Exhibits J and K. In fact, ComTec is currently doing wiring work for ACBOE as a subcontractor for MTG under its Year 6 award from ACBOE. See Exhibit M. For ComTec to be working on a contract that it helped award to MTG is a clear conflict of interest. Although ComTec did not submit its own bid to ACBOE for Year 6, in a futile attempt to avoid the appearance of a conflict of interest, its receipt of a subcontract from an award winner allowed it to share in the spoils of the contract after it had served as the consultant that recommended the successful bidder, which is a clear violation of FCC regulations.

The fraudulent relationships among the parties to the Year 6 ACBOE contract go even deeper. In its Year 6 proposal to ACBOE, MTG included quotations from its wiring subcontractor, Final Mile Technologies, to replace the wiring in the school district. Final Mile Technologies stated in that proposal that it had not visited the site and that its proposal was based entirely on information supplied to it by MTG. As noted above, MTG was awarded a $3.6 million contract, based upon Alemar's recommendation to ACBOE, that included about $700,000 to rewire the district's buildings. This award was made despite that Alemar knew that neither MTG nor Final Mile Technologies was licensed to do that work in New Jersey.[6] So, instead, MTG, as noted above, hired ComTec to be its wiring subcontractor for Year 6, and Alemar saw to it that Final Mile Technologies, for the very first time, received its own bid awards from Alemar's clients in Year 7. See Exhibit K. As described above, Alemar also arranged for ComTec to get

[6] Alemar did not disqualify MTG for submitting a bid that lacked evidence of the proper licensing certificates, as it did with a company called ISS, which submitted a bid for Year 7 that was disqualified by Alemar for lack of evidence of a proper license.

several contract awards at schools for which Alemar was managing the Year 6 and 7 bids as a reward for ComTec's very lucrative recommendation of Alemar to ACBOE.

Finally, the fraudulent scheme has come full circle in Year 7. MTG stated in its Year 7 bid proposal to ACBOE, contrary to its Year 6 proposal on the identical work, that it was not bidding on areas of the proposal in which it was not qualified. See Exhibit N. Incredibly, the areas in which it failed to bid because of lack of qualification included all of the wiring work that it had bid on and had been hired to perform by ACBOE in Year 6, as well as maintenance of the wiring that it is currently installing.[7] That decision by MTG allowed ACBOE to award the Year 7 wiring contract to ComTec.

ACBOE's response to the SLD is inaccurate and misleading in other ways. For example, ACBOE states in its Opposition that it sought in Year 6 a "best solution" to the numerous problems it was allegedly experiencing with its network. See Opposition at 7. As RelComm pointed out in its Request, that practice is contrary to USAC E-rate program rules that explicitly prohibit requests from bidders for "best solutions" and similar practices. The language is a violation because it fails to advise prospective bidders of the specific services and functions, including quantity and capacity, sought by the bid. The language also allows the applicant to maximize funding by choosing the vendor that it deems, in its sole discretion, to be the one providing the "best solution" -- a totally subjective standard of review. At his deposition, Martin Friedman claimed that the USAC Rule declaring that practice illegal was not promulgated until after ACBOE had posted its Year 6 Form 470 using the best solution language. Friedman, however, failed to acknowledge that USAC had a posting on its website as of December of 2002, at the time ACBOE posted its 470, under the heading "Warning to Funding Year 2003 Applicants and Service Providers Regarding Application Patterns That Violate FCC Rules." That Warning described several practices that the FCC considered to be violations of the rules, including the following statements. In light of these prohibitions, it is clear that the language used by ACBOE was a violation of FCC Rules:

[7] ACBOE's Year 7 bid is, in part, a re-bid of the Year 6 bid.

> Any FCC Form(s) 470 or RFP(s) issued by applicants that will form the basis for an FCC Form 471 application must define the specific services or functions (and quantity and/or capacity) for which funding will be sought and applicants must obtain specific cost information, including prices for products and services to be provided.
>
> ...
>
> By not being specific about the services sought and not seeking prices for those services, selecting a service provider through this type of FCC Form 470, RFP or other method violates the requirement to choose the most cost-effective provider.
>
> ...
>
> The RFPs and the winning proposals cannot be designed merely with the goal of "maximizing" funding. The intent of the Schools and Libraries Universal Service Support Mechanism is to help schools and libraries afford communication services required to meet educational objectives. An emphasis on maximizing SLD funding is incompatible with the FCC's objective of only providing funding for the most cost-effective alternative to meet legitimate educational objectives.
>
> RFPs or other solicitation methods must be tailored to the needs of each applicant. SLD has found nearly identical language in RFPs from a variety of applicants that resulted in awards to the same service provider. Applicants and service providers undermine the competitive process if they structure RFPs and competitive bidding processes that favor one service provider.

See USAC Website, www.sl.universalservice.org/whatsnew/2002/12002.asp (a copy of the complete page is attached hereto as Exhibit O).

The FCC must be prescient in promulgating its rules, because the very evil that it sought to avoid by announcing the above warning was evidenced in the award by ACBOE of its Year 6 contract to MTG. That "best solution", if allowed to stand, will cost the taxpayers a tidy $3.6 million. The bids in response to ACBOE's best solution Form 470 ranged from a low bid of $200,000 to MTG's highest bid of $3.6 million, which was more than double the next highest bidder at $1.4 million. This range of bids in response to the same 470 Form -- a range of 1800% -- cannot be explained in any way other than that the bidders did not know what they were supposed to bid on, and, as a result, they each bid on very different

assumptions. ACBOE, of course chose the highest bidder, one that was more than double the next highest bid, as its "best solution."

It is clear that ACBOE's Year 6 Form 470, which requested that bidders provide a best solution, violated FCC E-rate program rules.[8] In addition, RelComm has argued in its Request for Review that the Year 6 bid and award were contrary to the then-existing ACBOE Technology Plan, which is also a violation of FCC E-rate program rules. Friedman argued at his deposition that a technology plan is a fluid concept that can be deviated from as the school wishes. See Exhibit O. That assertion runs counter to the USAC's own statements about the importance of the school having a clear and specific technology plan that forms the basis for the applicant's request for E-rate funding.

> Prior to posting the Form 470 for any services other than basic telephone service, applicants are required to have a technology plan that defines the educational objectives to be served by technology, the technology needs, and the resources that will be required for those technology needs. The plan must include a sufficient level of information to justify and validate the products and services sought by means of the Form 470 and, if available, RFP. If the technology plan is not sufficiently developed before posting of the Form 470, the competitive process is undermined.

See USAC Website, Exhibit O. The ACBOE Year 6 bid and award, by deviating so drastically from the then-existing Technology Plan, violates that above principle.

Finally, Alemar re-bid the Year 6 request in Year 7, and, in response got numerous new bids. Friedman acknowledged at his deposition that he simply copied MTG's winning proposal from Year 6 and used that as the basis for the Year 7 request for proposals. Once ACBOE got word that its year 6 application had been funded, however, Alemar and ACBOE quickly withdrew the Year 7 duplicate application, which occurred well after ACBOE had received the proposals in response to that Form 470. Several of the proposals included provisions for the services that MTG had been selected to provide in

[8] Alemar used the identical language, i.e., it requested a best solution, in every other 470 Form it posted for each of its school clients.

Year 6 but at significantly lower prices than the contract awarded to MTG. Nonetheless, ACBOE did not seek to effectuate any spin changes to switch its year 6 awards to the lower bidders in Year 7.

In conclusion, RelComm has presented overwhelming evidence of fraud in which ACBOE, Alemar, MTG and others participated. RelComm's Request for Review should be granted, the SLD's decision to fund ACBOE's Year 6 application should be reversed, and ACBOE, Alemar, MTG and perhaps others should be suspended or disbarred from participation in the E-rate program.

Very truly yours,

FLASTER/GREENBERG P.C.

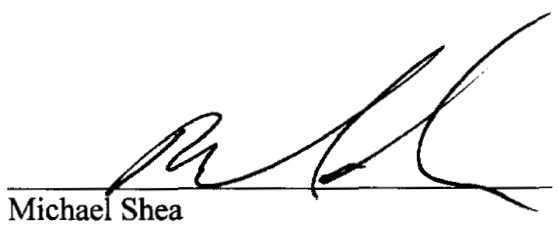
J. Philip Kirchner

JPK/kd

cc: Michael Blee, Esquire (via fax and overnight mail)
Gino Santori, Esquire (via fax and overnight mail)
Joseph Lang, Esquire (via fax and overnight mail)
Deborah Weinstein, Esquire (via fax and overnight mail)
Ralph Kelly, Esquire (via fax and overnight mail)
Michael Shea

VERIFICATION OF REQUEST FOR REVIEW

I, Michael Shea, am the President of RelComm, Inc., the aggrieved party which has filed the attached Reply in Support of Request for Review. I certify that I have read the Reply in Support of Request for Review and that the foregoing factual statements made in support thereof are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.



Michael Shea
RelComm, Inc.

DATED: October 22, 2004

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
OFFICE OF COMPLIANCE INVESTIGATION
INVESTIGATION UNIT

REPORT OF EXAMINATION – JANUARY 2004
ATLANTIC CITY SCHOOL DISTRICT - BID REVIEW

The Department of Education, Office of Compliance Investigation (OCI), conducted a limited review of the bid procedures of the Atlantic City School District regarding the e-rate application process for the 2003-2004 school year and consultants related to the e-rate application. As a result of the review, the following deficiency was noted.

1. **The Atlantic City Board of Education violated provisions of N.J.S.A. 18A:18A-4a by awarding contracts over the approved bid threshold.**

The Atlantic City Board of Education (Board) approved Alemar Consulting on January 14, 2003 to handle the e-rate application process and facilitate the bidding process for vendors for the internal connection portion of e-rate funding. ComTec Communications was approved at this meeting by the Board for telecommunications services, including review and recommendation of bids for the internal connections portion of e-rate funding. MTG was the successful bidder of the project and was board approved on February 11, 2003.

OCI received complaints regarding the bidding process and award of the bid to MTG. Complaints were received from two sources. Both complaints had similar accusations. The Atlantic City School District (district) was accused of approving MTG without benefit of proper bid procedures. According to documentation received, however, eight vendors bid on the internal connections project and the bidding was conducted appropriately.

There was a further complaint by both parties that the district approved a contract for $3.6 million that was not budgeted and not yet approved for e-rate funding. The district has not yet received the e-rate commitment for funding for 2003-2004. The district has been using the services of MTG during this period. However, there is a contingency in the MTG contract that the work is subject to funding. Therefore, the district will not be liable if the funding is not received. There is interim work being performed at the rates attained through the bidding process. This work does not represent the entire project.

The district was accused of hiring Alemar Consulting and ComTec Communications without using the bidding process. In fact, during the review it was confirmed that the services for Alemar and Com-Tec were not bid. Payments to Alemar during the 2002-2003 school year equaled $50,000. Payments to Com-Tec during the 2002-2003 school year equaled $30,000. These services are subject to bid because the amount paid is in excess of the bid threshold.

#39

The total cost of purchases for items that should have been bid amounted to $80,000.00. $9,657.47 of that amount is to be refunded to the Department of Education.

N.J.S.A. 18A:18A-4a, states "Every contract for the provision or performance of any goods or services, the cost of which in the aggregate exceeds the bid threshold, shall be awarded only by resolution of the board of education to the lowest responsible bidder after public advertising for bids and bidding therefor, except as is provided otherwise in this chapter or specifically by any other law."

Recommendation

The bidding violations noted above require a refund of State Aid to the Department of Education. The General Fund State Aid that must be refunded by the Atlantic City Board of Education is $9,657.47. The Division of Finance will notify the school district regarding the timing of the State Aid recovery.

In addition, the Atlantic City Board of Education must establish and implement procedures to ensure compliance with N.J.S.A. 18A:18A-4a.

Submitted by:

Kim C. Belin, Manager
Investigation Unit

Approved by:

Ray Montgomery, Director
Office of Compliance investigation

Auditor
Janet McNerney

#40

November 20, 2003

A.C. struggles with $2.6M. school deficit

By JOHN BRAND Staff Writer, (609) 272-7275

ATLANTIC CITY - Sixteen-year-old Bill Melfi was never much of an athlete, but, for the past three years, the History Club has been his after-school activity of choice.

Melfi, a junior at Atlantic City High School, and about 15 other club members were looking forward this year to trips to Camden and Philadelphia, where they planned to tour the National Constitution Center and gaze at the Liberty Bell.

That was until the Atlantic City Board of Education cut the History Club earlier this month.

"We didn't cost that much money to run," Melfi said. "I want to get it back."

The death of the club is a minor symptom of the district's budget crisis, which is about $2.6 million in the red.

Several other extra-curricular clubs at the high school have been cut or suspended, and the hope of bringing after-school sports to the district's 10 other schools has been squashed for the time being.

"I'll do whatever it takes to make sure we can offer those kids (after-school) programs, at least for the second half of the year," board member Dan Gallagher said.

In response to the deficit, the board recently froze district spending and non-critical maintenance projects. Some vacancies will not be filled, and taxes also may increase.

What happened?

Simply put, the district overspent its bank account by about $2.6 million. The 2002-03 voter-approved budget was about $105 million, which was used to fund 11 schools.

Money was borrowed from other accounts to cover the depleted general-expense funds, board members said.

"Over expending the budget is a violation of law," reads an audit prepared by the school board's Finance Department and released earlier this month. "The amount over expended will reduce the available money for future year budgets."

The board will draft a plan to correct the deficit at its meeting next

P24

• Special Reports

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Tuesday.

Some board members said the problem has surfaced in the past two years, while former Business Administrator Leslie Motts was in charge of the books.

Motts, who could not be reached Wednesday for comment, succeeded Lisa Mooney. Mooney was denied tenure two years ago, but was recently reinstated.

Gallagher said that over the past two years, the board has been asked to approve expense requests only hours before they were due.

The board approved about 40 unbudgeted staff positions, the biggest reason for the deficit, but never had reason to believe it was a problem.

"We were told the money was there, but the truth was that the money was not there," Gallagher said.

"The board wasn't apprised of what was going on. We were asked to vote on new hires and we weren't given adequate information to make that decision," he added, saying he believes the mistakes were unintended.

Board Member Tim Mooney said the board has directed the administration to conduct a thorough investigation of what occurred.

"It's a tragedy that the children aren't getting (the programs) we wanted to get for them," he said.

Unforeseen maintenance expenses and special-education costs and the absence of state-aid contributed to the deficit, the audit said.

The district also budgeted and spent $7 million left over from 2001-02, an uncommon practice.

Usually, a portion of that money is budgeted and the rest is saved.

"The person who was in control should have known, by looking at the books that the money wasn't there," Gallagher said.

Board President Jim Herzog said he is extremely upset about the budget crisis, but if the district is frugal he is optimistic that the problem can be rectified by the end of the year.

"Hopefully, a number of the clubs will be put back into place by the next meeting (on Tuesday)," he said. "Clubs are very important for high school kids to have on college applications."

Superintendent Fred Nickles could not be reached for comment Wednesday.

To e-mail John Brand at The Press:

JBrand@pressofac.com

November 26, 2003

A.C. school board tries to recover from $2.6 million deficit

By JOHN BRAND Staff Writer, (609) 272-7275

ATLANTIC CITY - Margarita Velez painted a grim picture for the Board of Education on Tuesday night when she explained the conditions that, she claims, children are exposed to at the Richmond Avenue School - one of 11 schools in the district.

Special education teachers have told children they're not properly certified for the positions.

Other teachers do homework for students or do not assign homework at all, she said.

Children taught in trailers behind the school walk unsupervised from the trailers to the school's entrance to eat lunch or attend other classes.

"If teachers walk the children from the trailers to the school, they'll go to the union to charge us more money," board member Dan Gallagher said. "I'm not saying I agree with it, but it's the truth."

Report cards are incomplete, federally funded after-school tutoring programs have been unavailable and only three Hispanic teachers teach at the school, which consists of predominantly Hispanic children, Velez said through an interpreter.

And with a $2.6 million budget deficit looming over the school district like an ominous cloud, there is no guarantee that conditions will improve.

Assistant Superintendent Melvin Clarke, who took notes at Tuesday's school board meeting for the unavailable Superintendent Fred Nickles, said he will look into the incomplete report card claim.

Other board members said they will address the other issues raised by Velez.

Concerned residents and taxpayers at Tuesday's meeting expressed their resentment with the district, its teachers, the board itself and the administrators.

The public-comment portion, alone, took two hours.

The $2.6 million 2002-03 budget deficit was at the heart of the bickering.

"This board says the children come first, but I think Mr. Nickles is first," said Frank Ervin, a former teacher and board member. "The man makes